82-382

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

MYRA B. ROBINSON, *Petitioner*

versus

UNITED STATES OF AMERICA, *Respondent*

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

Petition for Writ of Certiorari

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Questions Presented for Review

The only question presented for review is whether the petitioner, MYRA B. ROBINSON, herein referred to as the "petitioner," made a taxable gift when, in 1976, she gratuitously surrendered a special testamentary power granted to her under Paragraph 6 of the widow's election will of her husband who died in 1972. Petitioner had elected, in 1972, to accept under such will, which disposed of her community interest. It was stipulated that the value of what she received by such 1972 election exceeded the value of what she surrendered thereby.

Parties

There are no parties hereto other than those named in the caption of the case.

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To the United States Court of Appeals
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Petition for Writ of Certiorari

Official Reports in Courts Below

The official reports of this case in the courts below are found in 75 T.C. 346 (1980) and in 675 F.2d 774 (5th Cir., 1982).

Grounds for Invoking Jurisdiction

(a) The date of the decision of the Fifth Circuit sought to be reviewed is May 14, 1982.
(b) The date of the order denying petitioner's motion for rehearing of such decision is June 10, 1982.
(c) The statutory provisions conferring jurisdiction to grant the requested writ of certiorari are:
(1) *U.S. Const. Art. 3, Sec. 2, Cl. 2*
(2) *28 U.S.C. 1254(1)*

(3) *Supreme Court Rule 17, Paragraphs 1(a) and 1(c):*

(A) The decision below is in conflict with the decisions in other circuits.

(B) The decision below is in conflict with applicable decisions of this Court.

Constitutional Provisions, Statutes and Regulations Involved

The constitutional provisions, statutes and regulations which the case involves, including those in support of jurisdiction, are set out, in pertinent part, in the appendix, and are cited below:

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Statement of the Case

All evidence was stipulated. From such stipulations, and the opinions of the courts below, the following relevant facts are presented:

1. On February 27, 1972, G. R. Robinson, petitioner's husband, died testate and his will was admitted to probate on March 16, 1972. (Stips. 5 and 6)

2. His will gave petitioner a choice — she could elect to let her husband's will direct the disposition of her share of their community property and take fully under the will or she could retain her right to freely dispose of her community property share and take only a specific bequest of personal effects under the will. (75 T.C. 346, 347 and 675 F.2d 776)

3. On August 27, 1972, petitioner filed an election to accept the will's direction of the disposition of her community share. (75 T.C. 347 and 675 F.2d 776)

4. Pursuant to her election and her husband's will, petitioner's community property share became the corpus of the "Myra B. Robinson Trust" (hereinafter wife's trust) while her husband's interest in the community and any separate property he may have owned which was not specifically bequeathed were placed in the "G. R. Robinson Estate Trust" (hereinafter husband's trust). The

terms of the wife's trust provide petitioner with a right to all the net income of that trust for life, while under the husband's trust she has a right to an annual amount from that trust equal to 4 percent of the initial corpus. Upon petitioner's death, the corpora of the two trusts are to be combined and then divided into equal shares for certain descendants of petitioner and her deceased husband. (75 T.C. 347 and 675 F.2d 776)

5. Apart from her powers as trustee (held not to be relevant here), petitioner had the following powers over the wife's trust:

> During the life of my wife, she shall have the power, by recordable instrument delivered to the Trustee, to appoint any part or all of my wife's Trust free from such Trust to any one or more of our issue (or to the surviving spouse of any of our then deceased children) in such shares, manner and proportions as she shall see fit. In addition, my wife shall have the power, by recordable instrument delivered to the Trustee or by Will, to appoint any part or all of my wife's Trust free from such Trust to any one or more charities in such shares, manner and proportions as she shall see fit. Any such power described in this paragraph may be exercised only in a gratuitous way and not in a way which imposes any condition upon the recipient thereof. * * *

Thus, petitioner could appoint any part of the wife's trust to designated appointees or to qualifying charities. On

March 26, 1976, petitioner executed a valid release[1] of these appointment powers. (75 T.C. 348 and 675 F.2d 776)

6. When the wife's trust was created, its value was $731,741.94. The husband's trust had a value of $483,962.01 when it was created. Petitioner was born on

[1]The Fifth Circuit asked why petitioner released the power. The answer below was given (but not as a part of the trial record) in oral argument.

I, undersigned counsel, prepared the widow's election wills of the petitioner and her deceased husband. They were prepared in the light of various tax issues and planning as I understood them. Inflation was not then a serious problem and we were primarily interested in securing the Section 2043 deduction. Two unexpected things occurred.

First, decedent's husband died prematurely in a car accident. As a result her "received" annuity was of greater, and her "surrendered" remainder was of less, value than anticipated when the wills were signed.

Second, by the time of the release inflation was becoming a factor, and the Section 2043 offset would be relatively less valuable than exclusion of the trust.

In fact, it did not dawn on any of us until well into estate administration that petitioner had received an annuity greater than her surrendered remainder. When we realized this, the possibilities of excluding the trust from her estate seemed apparent. However, we were not aware at any time prior to briefing for the Tax Court case that the issue had been decided in any litigated case.

The only reason for the relinquishment of the power was the petitioner's long term uncertainty of how to plan her own affairs by reason of not knowing whether the trust would be included in her estate. The Service has a policy of not ruling on estate tax matters for living persons. *Rev. Proc. 72-3, Section 3.02, 1972-1 C.B. 698.* We were aware of the well established principle that estate and gift taxes are in *pari materia*. We felt that the only way to be certain about the future estate tax status of the trust (for a relatively young widow) was to release the retained power and test the matter by litigation under the gift tax laws.

Special efforts were made to get the gift tax returns audited. Then the examining agent filed a report finding no gift, hence no tax. While normally a favorable taxpayer result, we asked the district director in Dallas to seek technical advice from the Washington office, and we were relieved when Washington decided to propose a tax.

December 20, 1919. (75 T.C. 348 and 675 F.2d 777 footnote 6)[2]

7. The value of whatever petitioner gave up, with respect to her property passing under the will of G. R. Robinson, by reason of her election to take under his will, was less than the value of what she received under such will, with respect to her husband's property, by reason of her election filed on August 22, 1972. (Stip. 15, 75 T.C. 352 and 675 F.2d 777)

8. In its statutory notice of deficiency, the government asserted a gift tax deficiency of $58,676.97 based on its determination that, when petitioner released her special power to appoint, she made a taxable gift of the remainder in the wife's trust corpus (her community property share). (75 T.C. 348)

Basis for Tax Court's Jurisdiction

The basis for the jurisdiction of the Tax Court in this case is 26 U.S.C. 7442.

Argument in Support of Writ

The Fifth Circuit recognized that this Court held in *Sanford's Estate v. Commissioner*, 308 U.S. 39 (1939) that [citing from 675 F.2d 774 (footnote 13)]:

> "[t]here is nothing in the language of the statute, and our attention has not been directed to anything

[2]The disputed adjustment in interest referred to in footnote 6 at 675 F.2d 774 was $23,176.19 (as set out in footnote 2 of 75 T.C. 348). If the government was correct in its contention thereon, it would not change the accuracy of the stipulation referred to in Statement of Fact No. 7 above. The $236,622.58 referred to at 675 F.2d 774 would simply become $225,285.80, a value received still greater than the $195,065.72 surrendered.

in its legislative history to suggest that Congress had any purpose to tax gifts before the donor had fully parted with his interest in the property given, *or that the test of the completeness of the taxed gift was to be any different from that to be applied in determining whether the donor has retained an interest such that it becomes subject to the estate tax upon its extinguishment at death* . . . The two [taxes] are in pari materia and must be construed together.

"Accord, *Jewett v. Commissioner*, _____ U.S. _____, 102 S.Ct. 1082, 71 L.Ed.2d 170 (1982); *Burnet v. Guggenheim*, 288 U.S. 280, 286, 53 S.Ct. 369, 371, 77 L.Ed. 748, 751 (1933)."

(Emphasis added)

Thus, to support the Fifth Circuit's decision, it was essential for it to hold, and it did hold, erroneously, that had petitioner not released such power during her life, the wife's trust would have been included in her estate at her death. See 675 F.2d 779.

This holding was contrary to every other case (including three other circuits) which had considered the question. *Estate of Davis v. Commissioner*, 440 F.2d 896 (3rd Cir., 1970); *Commissioner v. Nelson*, 396 F.2d 519 (2nd Cir., 1968); *Estate of Christ v. Commissioner*, 480 F.2d 171 (9th Cir., 1973); *Estate of Gertrude Friedman*, 40 T.C. 714 (1963); and *Estate of Robert Rodger Glen*, 45 T.C. 323 (1966) (full court). It is also believed to be contrary to the philosophy of prior Fifth Circuit authority. See *Vardell's Estate v. Commissioner*, 307 F.2d 688 (5th Cir., 1962) and *U.S. v. Gordon*, 406 F.2d 332 at 341 et seq., esp. footnote 15 (5th Cir., 1969).

The theory applicable in each of these cases, and in the present case, is that one who provides the consideration for a "transfer" is the "transferor" thereof. Under this landmark principle, the power which petitioner released in 1976 was not created by her. By election in 1972 to take under the will, she received benefits stipulated to be of greater value than she surrendered. She surrendered no net value, and thus made no gift, to any one by virtue of such election (and later release of powers). The principle is well established that when A makes a gift to B on condition that B make a gift to C, the entire gift to C (to the extent of the transfer from A to B) is from A, not B.[3]

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[3] *Reg. 25.2511-1(h)(2)*[4]; *Reg. 25.2511-1(h)(3)*; *Lehman v. Commissioner*, 109 F.2d 99 (2nd Cir., 1940), cert. den. 310 U.S. 637 (1940); *Estate of Dora N. Marshall*, 51 T.C. 696 at 701 (1969); *U.S. v. Stapf*, 375 U.S. 118 (1963); *Estate of Sparling v. Commissioner*, 552 F.2d 1340 (9th Cir., 1977); *Seaman v. U.S.*, 156 F.2d 719 (7th Cir., 1946); *Estate of Martha R. Campbell*, 59 T.C. 133 (last paragraph on page 136) (1972); *Marva Trotter Barrow Spaulding*, 27 T.C. 479 (1956) aff'd on other grounds sub nom *First National Bank of Chicago, Trustee v. Commissioner*, 255 F.2d 759 (7th Cir., 1958); *Augustus E. Staley*, 41 B.T.A. 752 (1940); *Schultz v. U.S.*, 33 A.F.T.R.2d 74-199 (4th Cir., 1974); and *Merten's Law of Federal Gift and Estate Taxation*, 1959 Ed., Vol. 5, § 34.34. These authorities implement the explicit statutory recognition of "indirect" gifts referred to in *Section 2511(a)*.

Clearly petitioner did not meet the basic requirement of ever having made a "transfer." See *Merten's Law of Federal Gift & Estate Taxation*, Chapters 20 (esp. sections 20.14 and 20.15) and 21 (esp. sections 21.01 and 21.06).

The origination of the present gift tax statute (Section 2501) was in Section 501 of the Revenue Act of 1932. The following provision was found in both the House and Senate Reports accompanying passage thereof:

With reference to Section 501

"The words 'transfer * * * by gift' and 'whether * * * direct or indirect' are designed to cover and comprehend all transactions . . . whereby and to the extent (section 503) that property or a property right is *donatively* passed to or conferred upon another, regardless of the means or the device employed in its accomplishment. For example . . . (3) a transfer of property to B where there is imposed upon B the obligation of paying a commensurate annuity to C would be a gift to C; (4) the payment of money or the transfer of property to B in consideration whereof he is to render a service to C would constitute a gift to C or gifts both to B and to C depending on whether the service to be rendered by B to C was or

Under the so-called "widow's election will," such as the one here, the method of determining who the donor (or transferor) is is well established. That the term "adequate and full consideration in money or money's worth" has the same meaning in the gift tax provisions (e.g., Section 2512) as in the estate tax provisions (e.g., Sections 2036 and 2043) is clear. *Merrill v. Fahs*, 324 U.S. 308 (1945). It is similarly established that one put to an election under such a widow's election will receives "consideration" within the meaning of such estate and gift tax term; and that the estate and gift tax results are determined by reasoning that such widow gives (or transfers) a remainder interest in her own property (passing by such election) and receives such consideration in the form of a life estate[5] in the decedent's net property given therefor. *Commissioner v. Siegel*, 250 F.2d 339 (9th Cir., 1957); *Chase National Bank*, 25 T.C. 617 (1955), rev'd on

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was not an adequate and full consideration in money or money's worth for that which was received by B; . . ."

With reference to Section 503

"Since the tax is designed to reach all transfers to the extent that they are *donative*, and to exclude any consideration not reducible to money or money's worth, it is provided in this section that where the transfer is made for less than an adequate and full consideration in money or money's worth, the excess in value of the property transferred over such consideration shall be deemed a gift. For example, if A sells property worth $10,000 to B for $1,000, there is a gift of $9,000."

(Emphasis added)

H. Rept. No. 708, 72nd Cong., 1st Sess. (1939-1 C.B., Part 2, 457 at 476) and *S. Rept. No. 665, 72nd Cong., 1st Sess.* (1939-1 C.B., Part 2, 496 at 524)

[4]All references to a Section number shall be to the Internal Revenue Code of 1954, and all references to "Reg." shall be to the Treasury Regulations issued thereunder, unless otherwise indicated. Such references shall be to such Code Sections or Regulations, as amended, and as in effect at the pertinent time hereunder, namely, August 27, 1972, or March 26, 1976.

[5]In the present case, she received an annuity based upon the value of the decedent's estate, rather than a life estate therein. The result is the same. See *U.S. v. Gordon*, 406 F.2d 332 at footnote 15 (5th Cir., 1969).

other grounds sub nom *Commissioner v. Chase Manhattan Bank*, 259 F.2d 231 (5th Cir., 1958); *Vardell's Estate v. Commissioner*, 307 F.2d 688 (5th Cir., 1962); *Estate of Isabelle M. Sparling*, 60 T.C. 330 (1973), rev'd on other grounds, 552 F.2d 1340 (9th Cir., 1977); *Estate of Emma Bressani*, 45 T.C. 373 (1966); and *Zillah Mae Turman*, 35 T.C. 1123 (1961).

Admittedly, those cases above[6] which petitioner alleges are contrary to the decision below dealt with "dominion and control" under what is now *Section 2036(a)(1)*, whereas the power held by petitioner would have been tested by *Section 2036(a)(2)*.[7] However, it is incredible that "dominion and control" should be excused in *Section 2036(a)(1)* and not in *Section 2036(a)(2)* when the former involves retention of a greater personal economic benefit than the latter. Clearly, *Section 2036(a)(2)* type powers do not preclude deductibility in income tax cases. *Winthrop v. Meisels*, 281 F.2d 694 (2nd Cir., 1940) and *W. D. O'Brien*, 46 T.C. 583 (1966) [this *O'Brien* case being cited for estate tax purposes by *Greer v. U.S.*, 448 F.2d 937 at 945 (4th Cir., 1971)].

The aggregation of both *Section 2036(a)(1)* and *2036(a)(2)* type powers is no different from having a single such power. The general principle of aggregation of powers being different from the separate powers them-

[6] *Estate of Davis v. Commissioner*, 440 F.2d 896 (3rd Cir., 1970); *Commissioner v. Nelson*, 396 F.2d 519 (2nd Cir., 1968), *Estate of Christ v. Commissioner*, 480 F.2d 171 (9th Cir., 1973), *Estate of Gertrude Friedman*, 40 T.C. 714 (1963) and *Estate of Robert Rodger Glen*, 45 T.C. 323 (1966).

[7] Clearly, petitioner did not have the power to alter, amend or revoke under Section 2038 as suggested by the Fifth Circuit at 675 F.2d 773 and 774, footnote 12. Such a power would clearly have destroyed the measurability referred to at 675 F.2d 781, footnote 20. *Burnet v. Guggenheim*, 288 U.S. 280 (1933), cited at 675 F.2d 778, involved such a power to revoke.

selves was rejected under *Section 2036(a)(2)* in *Old Colony Trust Co. v. U.S.*, 423 F.2d 601 at 603 (1st Cir., 1970) (effectively overruling a prior contrary decision in such circuit), and in *U.S. v. Byrum*, 408 U.S. 125 (1972), esp. footnote 6. [The Court should not be misled by the holding in *Old Colony* that a separate power to designate beneficiaries nevertheless caused includability under *Section 2036(a)(2)*. The result in such case would have been the same had a life estate been retained, under *Section 2036(a)(1)*.]

So strong was the fascination of both lower courts with petitioner's "retention" of powers that they lost sight of the overriding, underlying purpose of the retention (i.e., dominion and control) provisions. They are designed to keep one who makes an estate-depleting "transfer" from enjoying a tax reduction therefrom if he has retained economic control over the gift. A "transfer" by the taxpayer is essential to taxation. (See footnote 3, especially following first paragraph.) The authorities overwhelmingly establish that the retention provisions have no application when there was no estate-depleting "transfer." By stipulation in this case, there was none. The following examples are illustrative:

> Situation 1 — A gives $10 to B on condition that B put $9 in a trust for A's children, C and D, from which trust B "retains," by agreement, a power to appoint such trust as between C and D.
>
> Situation 2 — A gives $10 to B on condition that B put $9 in a trust for A's children, C and D, from which trust B "retains," by agreement, a life estate.

In neither case has B done anything to deplete her estate, though literally she has "retained" dominion and control over the trust property. The situation is identical

in substance and result if B is eliminated from the transactional part, and A simply creates a trust for C and D giving B either a special power to appoint or a life estate, or both.

Since petitioner is not the one who created wife's trust, for the reasons above set out, no gift can be predicated upon the provisions of *Reg. 25.2511-2*, as was done by the Fifth Circuit at 674 F.2d 777, footnote 5. By its terms it applies only to a "donor," or one who has made a "transfer." See also the last sentence of *Reg. 25.2511-1(g)(1)*; and *Reg. 25.2511-1(h)* and *Reg. 25.2512-8*. By failing to recognize this, the lower courts are prospectively imposing a *double* transfer tax upon petitioner contrary to the philosophy of the clear policy implemented by the "full and adequate" consideration provisions of *Sections 2035-2038*, and by *Section 2043*.

For reasons cited in the courts below,[8] no gift tax can be predicated upon petitioner's release of power if such power is deemed created by her husband.

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[8]As to such a special and non-general power, there is no property interest other than the right to specify third party recipients. See *Estate of Steinman v. Commissioner*, 69 T.C. 804 at 809 (1978) and *Estate of Emma Bresani*, 45 T.C. 373 at 379 (1966). Congress has clearly excluded such powers from taxability since they fail to qualify as general powers of appointment under *Section 2514* (or *Section 2041*). *U.S. v. Field*, 255 U.S. 257 (1921) and *Merten's Law of Federal Gift and Estate Taxation*, 1959 Ed., Volume 5, §§ 34.10 and 34.11. Benefits flowing to third parties from the exercise of a special power of appointment, which exercise lowered the value of the exercising party's interest, have been held to emanate from the creator, and not the donee, of such power. See *Self v. U.S.*, 142 F. Supp. 939 (Ct. Cl., 1956) and *Commissioner v. Walston*, 168 F.2d 211 (4th Cir., 1948), affirming a divided Tax Court, 8 T.C. 72 (1947). See also *Reg. 25.2514-3(c), Example (3)*. *A fortiori*, no gift should result when the release of such power does not in any way reduce the benefits of the releasing party. The government has recently recognized this in *Revenue Ruling 79-327*, 1979-2 C.B. 342. In such ruling, it recognizes that a special power released by one to his own detriment is not taxable under *Section 2514*, but declines to follow *Self* and holds it taxable under *Section 2511*. By contrast, it properly holds that the release of such a special power, as here, results in no gift under *Section 2511*.

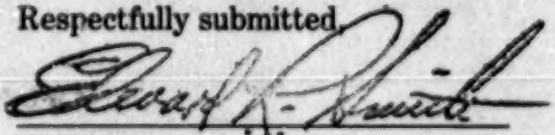
Summary

For the reasons, and based upon the authorities, set out above petitioner respectively seeks certiorari.

Appendix

An appendix, as required by Rule 21(k), is set out herein immediately following signature of counsel and certificate of service. The opinions below are set out therein (at A-1 and A-17) Original Signed By nal provisions, statutes and regulations required by Rule 21(f).

Respectfully submitted,



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CERTIFICATE OF SERVICE

It is hereby certified that service of this Petition for Writ of Certiorari has been made by mailing three copies thereof on this 30th day of August, 1982, in an envelope with postage prepaid, properly addressed to the following parties:

Solicitor General
Department of Justice
Washington, D.C. 20530

M. Carr Ferguson
Assistant Attorney General
Tax Division
United States Department of Justice
Washington, D.C. 20530
Attn: Michael L. Paup
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Original Signed By

EDWARD R. SMITH